IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 58

A. L. MECHLING BARGE LINES INC., a corporation, IRA BOOKWALTER, CULLOM COOPERATIVE GRAIN COMPANY, CHARLES TREASURE, GRISWOLD GRAIN COMPANY, and MAZON FARMERS ELEVATOR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

NO. 59

BOARD OF TRADE OF THE CITY OF CHICAGO,

Intervenor-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS.

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BRIEF OF PLAINTIFFS-APPELLANTS.

The appeal in Cause No. 58 was filed on behalf of A. L. Mechling Barge Lines Inc., a common carrier by water certified by the Interstate Commerce Commission (hereinafter referred to as "Commission"), and by five operators of country grain elevators located in north

central Illinois near the Illinois River and the Kankakee Belt branch of the New York Central Railroad. These parties were the original plaintiffs in the case below and will be referred to as "plaintiffs-appellants" to distinguish them from the Board of Trade of the City of Chicago, appellant in Cause No. 59, which intervened as a plaintiff in the case below and will be referred to herein as the "intervenor-appellant" or "Board of Trade" when singular reference may be necessary.

This Court by order dated June 17, 1963, noted probable jurisdiction of, and consolidated, Nos. 58 and 59.

OPINION BELOW.

The opinion of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, is reported at 209 F. Supp. 744, and appears at R.[1] 74-80. The report of the Commission dated June 8, 1960 appears at 310 I.C.C. 437, and in the record at R. 9-29. The proposed report of the Commission's examiner issued in this proceeding on March 16, 1959, appears at R. 32-52.

JURISDICTION.

This action was brought under 28 U.S.C. §§1336, 1398, 2284 and 2321-2325, inclusive, and 5 U.S.C. §1009, to enjoin and set aside an order of the Commission which relieved certain railroads (over the protests of numerous parties including the plaintiffs-appellants and intervenor-appellant) from the long-and-short haul prohibition of

[1] Reference herein to the printed record prepared by the Clerk is by the initial "R" followed by the page numbers. Reference to exhibits introduced before the Commission, but not printed in the record, is by exhibit number as assigned by the hearing examiner and marked as the exhibit.

Section 4 of the Interstate Commerce Act (49 U.S.C. §4(1)). The judgment of the District Court dismissing the complaint was entered on September 18, 1962. Plaintiffs-appellants filed their Notice of Appeal on November 16, 1962.

The jurisdiction of this Court is confirmed by 28 U.S.C. §§1253 and 2101(b).

Decisions sustaining the jurisdiction of this Court to review the judgment on direct appeal in this case include:

Interstate Commerce Commission v. *Mechling*, 330 U. S. 567 (1947);
Dixie Carriers v. *United States*, 351 U. S. 56 (1956);

STATUTES INVOLVED

The following statutes are involved:

The National Transportation Policy, 49 U.S.C. Note preceding Section 1;
Section 1(5) of the Interstate Commerce Act, 49 U.S.C. §1(5);
Section 3(1) and (4) of the Interstate Commerce Act, 49 U.S.C. §3(1) and (4);
Section 4(1) of the Interstate Commerce Act, 49 U.S.C. §4(1);
Section 12(1) of the Interstate Commerce Act, 49 U.S.C. §12(1);
Section 13(1) of the Interstate Commerce Act, 49 U.S.C. §13(1);

The foregoing statutes are set forth in the Appendix.

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

1. In a proceeding under Section 4 of the Interstate Commerce Act, was it error for the Commission to disregard evidence that a separately published inbound factor of two-factor rail rates is too low to cover the publishing railroads' out-of-pocket costs for such transportation services, when that noncompensatory inbound factor was published from the more distant point and only the transportation covered by that noncompensatory inbound factor was subject to the competition claimed as a justification for the fourth section departure for which the Commission granted authorization?

2. Is Section 4 of the Interstate Commerce Act applied in accordance with the mandate of the National Transportation Policy when a reduced rail rate departing from Section 4 is authorized by the Commission, even though the rate will divert traffic from regulated water carriers and no showing is made that it will increase the net revenues of the railroads proposing such departure?

3. In considering whether a combination two-factor rail rate on corn (to be milled in transit) was compensatory within the meaning of Section 4 of the Interstate Commerce Act, was the Commission in error in considering the revenue from both factors of the rate while at the same time refusing to consider evidence that the applicant railroads would receive the revenue from the noncompetitive reshipping rate factor whether corn was brought to the reshipping point by water or by rail, where the inbound rail rate factor would not be sufficient to cover out-of-pocket costs of the applicants on the inbound rail haul?

4. In a proceeding under Section 4 of the Interstate Commerce Act instituted after duly filed protests alleged violations of the National Transportation Policy and of other sections of the Act, was it error for the Commission to authorize a rate violating Section 4 without considering duly presented evidence, introduced without objection, that such rate would violate other sections of the Act and the mandate of the National Transportation Policy, and excluding other evidence to like effect?

5. In a proceeding under Section 4 of the Interstate Commerce Act was the conclusion of the Commission that the applicant rail carriers had shown a special case authorizing the establishment of the rate in question based on requisite findings supported by evidence substantial enough to warrant disregard of the examiner's contrary findings?

STATEMENT OF THE CASE.

Plaintiff-appellant Mechling is a common carrier certificated under Part III of the Interstate Commerce Act, and operating barges for the transportation of grain on the Illinois River to Chicago (R. 2, 72).

The other five plaintiffs-appellants are operators of country elevators at locations near the Kankakee Belt Line of the New York Central Railroad west of Kankakee, Illinois and the Illinois River. The Chicago Board of Trade maintains the principal price-registering market for corn in the United States, with corn arriving in Chicago by barge, rail or lake vessel for reshipment to, among other places, destinations east of Chicago (Ex. 43, 44, 45).

The Kankakee Belt Line of the New York Central Railroad Company (NYC) extends from South Bend,

Indiana through Kankakee, Illinois and westward to Zearing, Illinois (R. 295). West of Kankakee it lies at gradually diminishing distances south of the Illinois River until the track crosses the river at Moronts (R. 199, Ex. 2), with trucking distances to river ports from such Kankakee Belt stations varying from 4 to 36 miles (R. 295, Ex. 2). It was constructed to bypass the Chicago Gateway (R. 329-330) and carries substantial amounts of traffic interchanged with other railroads at various points on the line (R. 330). Only an insignificant amount of traffic in manufactured or miscellaneous articles originates or terminates west of Kankakee (R. 295).

The area around the Illinois River and the Kankakee Belt produces a substantial surplus of corn (R. 297), except that the area from Moronts to Zearing is not suitable for farming and no corn is produced for shipment (R. 370).

On behalf of various connecting railroads between the Kankakee Belt and destinations to the east, the Traffic Executives Association-Eastern Railroads applied on June 27, 1957, to the Commission for authority to depart from the long-short haul rate prohibition of Section 4 with respect to combination rates on corn products moving to eastern destinations when milled from corn originating at Kankakee Belt stations between Kankakee and Moronts (not including Kankakee) (R. 138-139). The rates combined were a proportional rate of 5½¢ per hundredweight on the corn from origin to Kankakee and the reshipping rate from Kankakee to destination on the products milled from the corn (R. 296). The combination rates were lower than the local rates on corn and corn products from Kankakee and intermediate origins in Indiana to the same destinations over the

same lines (R. 147). The local rates from the Kankakee Belt stations to Kankakee would have ranged from 16¢ to 25¢ per cwt. if the 5½¢ rate were not applicable (Ex. 62, pp. 1-2).

The justification alleged by the applicants for the relief was that the filed barge rates on corn to Chicago averaged about 4.625¢[18] per cwt. from Illinois River ports (R. 299, 154) and that the 5½¢ rate to Kankakee was necessary to compete with the barge transportation to Chicago, the transportation to the east being at the same reshipping rate by the applicant railroads whether reshipment was from Kankakee or Chicago (R. 299-301, Ex. 9, 10).

The plaintiffs and Board of Trade, as well as many others, duly filed with the Commission protests against granting the requested relief (R. 96-137). In these protests they urged that the applicants had not met their burden of showing (1) that the separately-published 5½¢ rate was reasonable in compliance with Section 1 of the Interstate Commerce Act (R. 236-237, 241); (2) that the 5½¢ rate was compensatory or that the amount of corn carried eastward by the railroads from Chicago and Kankakee would be increased sufficiently over the amounts then carried to compensate for the out-of-pocket deficits incurred on the haul to Kankakee, as required by Section 4 (R. 237, 241); or (3) that the large reduction in rate was no lower than necessary to meet water competition alleged as the reason for the reduction, as required by

[18] New tariffs were filed by the barge lines during the proceeding under which the average rates were increased to approximately 4.825¢ per cwt. (R. 299, 301). All Mechling's transportation of corn to Chicago is performed at rates filed in its tariffs (R. 618). Mechling hauls most of the corn brought to Chicago by barge (Ex. 19), and no other water carrier representative testified or took part in this proceeding.

Section 4 and the National Transportation Policy (R. 189, 237-239, 241). In addition they urged that establishment of the reduced proportional rate into Kankakee would be discriminatory against other towns similarly situated and particularly against the City of Chicago which had natural geographical advantages entirely lacking to Kankakee, and that this discrimination violated Section 3 of the Act (R. 180, 241). Furthermore the protests urged that the rates violated the National Transportation Policy in depriving the barge carriers of their inherent low cost advantage (R. 238); and also Section 3(4) of the Act if the rail carriers from Chicago allowed a division out of the reshipping rate to the rail carrier from Kankakee to Chicago on corn or corn products routed through Chicago from Kankakee to the east, since the charge for the haul from Chicago to the east on this corn would then be less than the charge from Chicago to the east on corn brought to Chicago by barge (R. 237).

A. The Noncompensatory 5½¢ Rate.

The evidence showed that the out-of-pocket cost to the NYC in bringing the corn from Belt stations to Kankakee would average 8.56¢ per cwt., assuming a 55-ton load per car and an average haul of 38.3 miles (R. 600-601) and using the unit cost allocation method developed by the Commission for use in earlier rate cases (R. 594). The fully distributed cost was 13.12¢ per cwt. Upon making other assumptions as to car loadings (the tariff minimum of 50 tons) and average distance of haul (46.4 miles, the arithmetical average of the distances of the Belt stations from Kankakee), the costs were 9.63¢ and 14.33¢, respectively (Ex. 32). The examiner found that the 5½¢ rate was lower than the out-of-pocket cost of the transportation from Belt sta-

tions to Kankakee (R. 48-49, 50, 51). The Commission found the out-of-pocket costs on the haul into Kankakee to be as recited above, but its findings on the compensatory nature of the rates related only to the combined rates (R. 25).

Applicants offered no evidence to show the effect of the 5½¢ rate on total shipments to the east from Kankakee and Chicago. The NYC's witness appeared to assume that the corn originating at the Belt stations at 5½¢ rate would only displace ex-barge corn in the eastern market (R. 315-318), and Witness Chartrand testified that the only economical use of barge billing at Chicago was for shipment via the applicant railroads to the east (R. 821-822). Witness Tascik testified, "My concern is with the New York Central. I don't know what traffic any other railroad might have lost; my one concern was to get traffic for the New York Central" (R. 318). Witness Geekie, located at Paris, Illinois, testified that after the 5½¢ became effective he bought less corn from the west in the territory served by the NYC's lines to St. Louis and to Cairo (R. 518). The Commission made no finding on whether the 5½¢ rate had increased the total rail movement to the east from Chicago and Kankakee.

The applicants relied on comparisons of the combined rates to Atlantic Coast corn export rates from Belt stations and bulk corn export rates from ports on Lake Erie to various Atlantic Coast ports (R. 306, Ex. 17). They further compared the 5½¢ rate requiring transit to a local intrastate rate in Minnesota of 6¢ per cwt. for a distance of 59 miles (Ex. 18), on which no transit was allowed (R. 363). Witness Tascik specifically acknowledged that "any comparison of the five and a half cent rate with some other rate, a local rate, is not comparing like with like" (R. 387).

Witness Tascik's principal basis for urging that the rate was compensatory, however, was that by hauling the corn from Belt stations into Kankakee, the NYC avoided having to haul the corn from Chicago to Kankakee as part of the routing to the east allowed on the reshipping rate from Chicago, thereby realizing the added income from the 5½¢ rate and avoiding the NYC's circuitous haul from Chicago to Kankakee as well as switching charges in Chicago (R. 304-305, 318, 320-321). To effect this saving Witness Tascik intended the corn to go to Kankakee and then to the east without going through Chicago, since movement through Chicago and east would entail not only the haul to Kankakee from the Belt station but also the haul from Kankakee to Chicago with no additional income to the applicants as a group other than the 5½¢ rate (R. 320-321, 339-340). Thus Witness Tascik's justification depended entirely upon his success in preventing corn originating at Belt stations from moving through Chicago.

The Commission found that the NYC realized the saving in switching absorptions and the 5½¢ additional revenue, but did not note that these savings and added revenues could result only to the extent that the corn could be prevented from going through Chicago (R. 24-25).

The examiner found that a substantial part of the switching cost at Chicago was paid to railroads in which the NYC had a proprietary interest (R. 47; see Ex. 14 and R. 382), but the Commission was silent on the point. Both found that the Illinois Central Railroad Company, also one of the applicants, had a more direct line to Chicago from Kankakee than the NYC (R. 46, 23-24, 326, 337).

B. Discrimination Against Chicago, Its Processors and Merchants.

As noted above Witness Tascik, the NYC freight sales manager, sought insofar as possible to exclude Chicago from the routing of grain originating at the Belt stations and carried at the 5½¢ rate. At the hearing the NYC counsel obviously thought that the rates had been constructed so as to exclude use by the wet corn processors in Chicago and appeared surprised that Chicago processors could move corn gluten feed and meal on the 5½¢ rate (R. 768-769, 790-791). In fact, the design to exclude Chicago use of the rate was so well executed that in the first six months of 1957 while the reduced rate was in effect on the Belt, only about 20 cars out of the 1,905 shipped under the reduced rate were routed through Chicago (Ex. 13, R. 304, 321-322). The free corn going to Chicago from Belt towns declined in ten months of 1957 to 46 cars from 273 in the same period of 1956 (R. 803, Ex. 49).

The examiner made no findings on the charges of discrimination against Chicago and its processors. He stated that, because of his conclusion that the 5½¢ rate should not be authorized, they need not be considered in the proceeding (R. 49) and recommended that applicants consider them in any future proposal (R. 52). The Commission dismissed them as not dealing directly "with the fourth-section principles here involved," observing erroneously as an afterthought that Chicago had the same stature as all other corn processing points in official territory (R. 27). In so doing it ignored the NYC's attempt to make the 5½¢ rate usable only by dry corn processors and not by Chicago's wet corn processors.

C. Discrimination Against Connecting Barge Carriers At Chicago.

Witness Tascik testified that if corn from the Belt were carried to Chicago from Kankakee by the NYC and then hauled east from Chicago via another railroad with milling in transit, the 5½¢ rate would apply to the haul to Kankakee, and the Kankakee reshipping rate (equal to the Chicago reshipping rate) to the remainder of the haul (R. 339). From the reshipping rate of 49.5¢ per cwt. on products milled from the corn (using New York City as an example), the NYC received a division of 13¢ per cwt. for its haul from Kankakee to Chicago (R. 340), and the rail carrier from Chicago to New York City received only 36.5¢. Yet on the same transportation of products milled from ex-barge corn from Chicago to New York City, the rail carrier would charge 49.5¢ per cwt. Attempts to examine further into this apparent discrimination against connecting barge carriers at Chicago met with objections which were sustained by the examiner (R. 342-344). Exceptions to this ruling have been urged at each stage of the proceeding, but no change has been made in it; and the discrimination against connecting common carriers by water was ignored by the Commission.

D. Inherent Low Cost Advantage of the Barge Lines.

The NYC's fully-distributed cost of hauling corn from Belt stations to Kankakee averaged 13.12¢ to 14.33¢ per cwt., as shown above. Mechling's average fully distributed cost of hauling corn to Chicago from six river ports was 87.93¢ per net ton, or about 4.4¢ per cwt. (Ex. 35, R. 632). The Commission found this approximate 10¢ per cwt. low cost advantage of Mechling to exist, but held that it was not entitled to any protection "where, as in this instance, the railroad's efforts to secure traffic

do not amount to a destructive competitive practice" (R. 26).

E. Destructively Low Level of the Rate.

Although the plaintiffs did not deny that some rate reduction from the Belt stations was in order, they and other protestants urged that the 5½¢ rate was much more of a reduction than was required to meet water competition and would in time eliminate water competition from the area. The rates suggested by various protestants in the proceeding before the Commission varied from 14.5¢ to 15.5¢ per cwt. (R. 51-52).

Witnesses from three of the principal grain dealers operating river elevators at ports near the Belt testified that the water shipper necessarily must incur expenses peculiar to their operation in addition to the cost of the transportation itself in order to take advantage of water transportation, and that these additional (or "accessorial" as they are now called in Commission opinions) charges must be taken into account in determining the level to which a rail rate can be reduced without threatening the destruction of the water competition alleged as justification for reducing the rail rates. These accessorial charges in this proceeding were (1) trucking from a country elevator to the river elevator; (2) transfer from the river elevator to the barge; (3) stevedoring or trimming the barge at the unloading point in Chicago; (4) Chicago elevation and transfer to rail; and (5) an outbound inspection charge if it were not included in the Chicago elevation charge. The three witnesses testified that these charges would total from 13.3¢ to 13.55¢ per cwt., of which trucking to the river elevator accounted for 5.4¢ (R. 728-729, Ex. 39, R. 747, 755-756).

Later testimony developed that in some instances trucks hauled corn directly from the farm to river elevator and that the trucking charges would be to a certain extent offset by the haul from the farm to a Belt elevator. Even in the case of direct hauls to elevators, however, the haul to the river elevator was on the average much longer because the river elevator by reason of its much larger size drew corn from a radius of up to 25 miles and even 40 miles at times (R. 761, 767), whereas the operators of the smaller Belt elevators testified that they sought corn from only a five or six mile radius (R. 448, 490). Ordinarily trucking to the river was more costly than trucking to the Belt elevator (R. 474). In its order the Commission characterized this higher cost of the longer average haul to the river elevator as "elusive" "logic." (R. 20). It measured trucking costs only from a point exactly midway between Belt and river elevator (R. 20), rather than taking into account the realities of the larger supply area required for the large operations of river elevators shipping 500 tons in one barge as compared to the small operations of railroad elevators shipping 50 tons in one rail car (R. 755).

The Belt elevator's charge for transferring the corn from truck to rail car would not offset the river elevator's transfer charge because the river elevator operators paid a markup to country elevator operators from whom they bought the grain, and this markup was about the same as, or only slightly less than, the markup of the Belt operator transferring into a rail car (R. 743, 772, 824). The large river elevator operators found it necessary to buy through country elevator operators to get the necessary volume of corn (R. 736, 746, 772). Witness Graves, testifying in support of applicants, acknowledged that the river elevator operators had to pay a markup to the coun-

try elevators operators, but allowed only 1¢ per bushel for it in his Exhibit 25.

The Board of Trade studied bids for corn by the elevators at the five principal river ports and in rail cars at five Belt elevators for an eight-month period during which the reduced Belt rate was in effect[1] (Ex. 54). This study showed that on the average the rail bid was about 2¢ per bushel more than the river elevator bid (R. 808-809). The Commission concluded that the study was "defective in that . . . the Belt bids during the comparison period . . . applied to corn at different levels in the transportation chain" (R. 22) from the river elevator bids, because the Belt bids were f.o.b. rail car after elevation while the river bids were f.o.b. trucks at the river prior to elevation into barges (R. 20). The Commission thereby ignored the testimony that the country elevator's markup was about the same whether the operator elevated the corn into the rail car or trucked it to the river elevator. It allowed nothing for the country elevator's markup.

This same conclusion was drawn in a comparison of the rail bid at Missal on the Belt and the nearest river elevator, the Commission concluding that "an adjustment to eliminate the cost of elevation (averaging 2.5¢ per bushel) would place it [the rail bid at Missal] one cent below the river bid at comparable stages in the transportation chain" (R. 17). Yet the witness who testified to this price comparison specifically stated that the rail elevator would get the corn rather than the river elevator (R. 655-656). It was agreed that a price advantage of

[1] The reduced Belt rate went into effect on December 15, 1956 (R. 300), but the applicants did not apply to the Commission for the prerequisite fourth section relief until June 28, 1957.

as little as one-half cent per bushel would attract the corn (R. 759).

The Commission found that the 1956 corn crop in the area was somewhat heavier than the 1955 crop, thus increasing the amount of corn movement in 1957 (R. 14)[3]. It also found that of ten river ports used by the NYC witness in Exhibit 19 to compare barge movements from December 15, 1956 to August 30, 1957 when the reduced rate was in effect with those of December 15, 1955 to August 30, 1956 when the rate was not in effect, Lockport and Joliet were not affected by the reduced rate to the same extent as other ports (by reason of their greater distance from the Belt) and that from Hennepin, Henry and Lacon the predominant movement was south in the earlier period and to Chicago in the later period[4] (R. 14). It further noted that Glidden's river elevators (located at Seneca and Lockport (R. 745)) were opened in the fall of 1956 (R. 14-15) and so contributed nothing to any barge movement in the 1956 period. The Commission further found that from the

[3] Witness Cunningham testified the corn crop was 86,000,000 bushels greater in 1956 than in 1955 (R. 727). The total amount of corn shipped to Chicago from all sources increased from 92,037,000 bushels in 1956 to 137,577,000 bushels in 1957, and rail traffic in corn to Chicago increased from 68,702,000 bushels to 99,396,000 bushels, an increase of 44.7%. Barge receipts increased only about 30.5% (R. 797). River elevator receipts from south of the river uniformly declined sharply during early 1957 (R. 14), but receipts from north of the river increased because of the larger crop (R. 738). The rail movement on the Kankakee Belt increased from 464 carloads in 1956 to 2681 carloads in 1957 (R. 13-14). Of the 1957 amount only about 20%, largely Commodity Credit Corn not subject to the 5½¢ rate, went through or to Chicago (R. 321).

[4] Mechling moved only 24,596 tons of grain from these ports to Chicago in the earlier period and 75,522 tons in the later period (R. 635).

five ports of Morris, Seneca, Ottawa, La Salle and Spring Valley, (which were the only ones listed by the applicants as competitive in their application (R. 154)). Mechling's barge movement to Chicago was lower by 22,928 tons[*] during the competition period than during the corresponding period a year earlier (R. 14). This finding is at variance with Witness Mechling's testimony that the reduction was in fact 27,575 tons (Ex. 33) and Witness Tascik's showing of a decline of 31,724 tons (Ex. 19, p. 2) in the December 15-to-late-August periods they used for comparison.

Nevertheless the Commission drew its conclusion only from a comparison of barge movements to Chicago from all ten ports during the two periods. From this comparison involving so many extraneous factors, the Commission concluded "it is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges and that the rates proposed were not lower than necessary to meet barge competition" (R. 28). The Commission took no account of those influences other than the rate reduction which it had earlier found to exist, and which made the bare comparison of the ten port figures invalid for the purpose of determining the extent to which the reduced rail rate had cut into water transportation.

The Commission also ignored uncontradicted testimony that the reduced Belt rate was not widely known in the early part of 1957 and that use of the rate was increasing sharply at the time of the hearings in early 1958. At least one Belt elevator had then begun advertising its rate advantage (R. 727, 697, 702, 708-9).

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[*] 22,928 tons would equal 818,857 bushels, 27,575 tons would be about 986,600 bushels, and 31,724 tons would be about 1,133,000 bushels.

The Commission further refused to consider the disruption of the equality of competitive opportunity for all elevators in the area (which the grain rate structure in Illinois was designed to protect) by the fact that the 5½¢ rate was too low for other railroads to meet although they were willing to reduce rates far enough to meet truck and barge competition (R. 713-714).

The examiner took into account all these factors and found that the 5½¢ rate was lower than necessary to meet the barge competition (R. 50-51).

ARGUMENT.

Introduction—

The Commission has erred in a number of ways which may be grouped under three main subjects: (1) in refusing as a matter of law to consider whether the 5½¢ rate was compensatory when the evidence clearly showed that it did not cover out-of-pocket cost of the haul to Kankakee, even though the evidence indicated that it was the only additional revenue received by applicants for the added work of hauling the corn to Kankakee; (2) in refusing as a matter of law to consider whether the rates violated the National Transportation Policy and Sections 3(1) and 3(4) of the Act, even though these questions had been raised in protests timely filed by appellants, as well as others, and notwithstanding the Commission's obligation under Section 12 of the Act to enforce all sections of the Act; and (3) in concluding, contrary to many of its own findings, to the examiner's findings and conclusions, and to the evidence, that the river elevators were effectively outbidding the Belt elevators for corn in the area from which it further concluded that the 5½¢ rate was no lower than necessary to meet the water competition.

I. THE 5½¢ RATE WAS NON-COMPENSATORY AND UNLAWFUL.

A. As a Separately Published Rate From Water-Competitive Points, The 5½¢ Rate Was Required By Both Sections 4 And 1 Of The Interstate Commerce Act To Be Compensatory.

The 5½¢ rate did not cover the out-of-pocket costs of the transportation service for which it was charged.

The evidence so showed, the examiner so found, and the Commission does not deny the fact. Indeed by finding the out-of-pocket costs for the service to be from 8.56¢ to 9.66¢ per cwt. (R. 25), the Commission tacitly admitted that, considered by itself, the 5½¢ rate fails by a considerable margin to cover out-of-pocket costs.

The Commission concluded as a matter of law, however, that the 5½¢ rate should not be considered by itself, but only the combination rates need be compensatory to meet the requirement of Section 4. The Commission did not discuss Section 1, but presumably it would take the same position with respect to that section. It rested this conclusion on the publication of the rate as a separately-published proportional rate to be used in combination with the reshipping rates from Kankakee to the east, together with the fact that these combinations produce the fourth section violations requiring Commission authorization. In so doing, the Commission ignored both language and purpose of Section 4.

Section 4 provides in pertinent part as follows:

> "It shall be unlawful for any common carrier subject to this chapter . . . to charge or receive any greater compensation in the aggregate for the transportation of . . . like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance . . . : Provided, that upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of . . . property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but

> in exercising the authority conferred upon it in this proviso, the Commission *shall not* permit the establishment of *any* charge to or from the more distant point that is not reasonably compensatory for the service performed. . . ." (Emphasis ours)

The prohibition of establishment of any non-compensatory charge from the more distant Belt origin stations[6] is complete. The Commission *shall not* permit the establishment of *any* such charge. The charge prohibited is a non-compensatory charge *from* the more distant point, when the variation in distance is at the origin while the destinations are common, as in this case. The reference is solely to the charge from the more distant point, and not to the combination charges, although combination charges were well known in 1920 when this language was incorporated into Section 4 by the Transportation Act of 1920.[7] Indeed, the opening sentence of Section 4 refers to "greater compensation in the aggregate" rather than to a single charge, and it is clear that the first sentence does refer to combination rates as well as to single-factor rates.

This distinction between the language used in the first sentence and in the proviso's condition was intentional. The more distant point is the point at which competition must occur to have the special case required by Section 4. By requiring any charge from the point of competition to be compensatory, Congress sought to prevent publication of competitive rates which were non-compensatory,

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[6] As compared to Kankakee or Indiana origin stations.

[7] 41 Stat. 480. The language did not originally appear in the House Bill, but the Senate proposed similar language and the conference committee settled on this language. H. Rep. No. 650, p. 63, H. R. Rep., Vol. 1, 66th Cong., 2nd Sess. (1919-1920).

even though they might be combined with non-competitive rates which were high enough to supply the deficiency of revenue from the competitive rate.

The precise situation contemplated and forbidden by Congress is presented by this case. The water carriers end their transportation at Chicago. The reshipping rates to the east from Chicago applicable to ex-barge corn there are the same as the reshipping rates from Kankakee applicable to corn brought from the Belt elevators to Kankakee. There is no competition between these rates, both of which are under applicants' control. Both rates are enough higher than the cost of the eastern leg of the haul to subsidize the non-compensatory 5½¢ rate.[9]

In enacting in the Transportation Act of 1920[9] the requirement that *any* charge from the more distant point be compensatory, Congress sought to protect the water carrier from below-cost rate competition of the railroads in any form. In explaining the purpose of this amendment to Section 4, Senator Townsend stated:[10]

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[9] Ironically, all the corn brought by the barge lines to Chicago must be carried east by applicants at this reshipping rate if the corn is to be used to advantage. The barge transportation thus promotes the use of the rate used by the applicants to subsidize the non-compensatory rate by which they seek to take away the barge traffic.

[9] 41 Stat. 474.

[10] The context of the pertinent portion of Senator Townsend's speech is as follows:

> ". . . The system of rate fixing has existed in this country for many, many years. Cities have been builded; the whole country has been established upon these arrangements. Some of them have been wrong. It has been wrong and is so now to fix the longer-haul rate so low that in itself it is not compensatory; that is, it does not yield its proper portion of the expense of

"When the committee had the bill before it I offered an amendment to that provision, which was adopted, which states positively that no rate shall be fixed by the Commission which in itself is not compensatory, that is, which does not yield a proper proportion to the expense of operation of the line." (Emphasis supplied)

Further evidence of this congressional intent to protect water transportation from cutthroat railroad rate competition may be found in other provisions of the Act of 1920. Potential water-competition could not constitute a "special case" justifying grant of relief. In Section 15 the Commission was for the first time empowered to fix minimum rates, a power intended to protect competing water carriers from the pressure of below-cost rate competition by the railroads, as was made clear in the committee reports.

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[10] (Continued)

operation of the railroad system. Then it stands to reason that the shorter routes paying the higher proportioned rate must have an additional burden placed upon them. That is wrong.

"When the committee had the bill before it I offered an amendment to that provision, which was adopted, which states positively that no rate shall be fixed by the Commission which in itself is not compensatory; that is, which does not yield a proper proportion to the expense of the operation of the line. We also provided that purely latent water competition shall not be the basis for the establishment of rates. What I mean by that is this:

"It has been known for a good many years that what are known as Mississippi and Missouri River points have had lower rates than longer [sic] distances on either side, because of the possibility of water competition over the Mississippi and Missouri Rivers. Evidently the object of that was to keep water transportation off both rivers." 59 Cong. Rec., Part I, p. 740, 66th Cong., 2d Sess. (1919).

The House Committee Report on the bill said:

> "With this power the Commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service by establishing a minimum below which such carrier could not fix its rate. It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off, the rail rates would be restored and would rise to even higher levels."
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> H. Rep. No. 456, p. 19, 66th Cong. 1st Sess.

Stating the purpose of the 1920 amendments on the floor of the House, the Chairman of the Committee, Congressman Esch, pointed out the common purpose of the new minimum rate rule and the amendments of Section 4 by the same act:

> "We give [the Commission] the right of fixing the minimum rate in order that it may meet some of the problems arising out of the long-and-short haul clause as contained in the fourth section. We give it the right of fixing a minimum rate in order that it may protect a water carrier against the destructive competition of a rail carrier. You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before."
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> 58 Cong. Rec. 8317, 66th Cong., 1st Sess. (1918).

The commission itself has so construed the effect of the Act of 1920. In the *Transcontinental Cases of 1922*, 74 I.C.C. 48, 70-71 (1922), the Commission, in determining what constitutes a "reasonably compensatory" rate, referred to the purpose of Congress in enacting the amendment, as follows:

> "The criterion of a reasonably compensatory rate suggested by the carriers has been indicated above. It is summarized in the formula 'out-of-pocket-expenses-plus-some-profit.'
>
> "Just as we have rejected the two interpretations of 'reasonably compensatory', suggested by the protestants as too narrow, so we are disposed to reject the single criterion suggested by the carriers in the above formula as insufficient, standing alone. It is probably true that this formula was deemed by us as adequate in disposing of fourth-section applications prior to the amendments of the fourth section in the transportation act, 1920, *Fourth Section Violations in the Southeast*, 30 I.C.C., 153. We do not agree with the carriers that the fourth section has not been changed in substance. The amendment has made mandatory what theretofore rested in our sound discretion *as to compensation for the service performed to the more distant point, as to circuity, and as to potential water competition.* Moreover, in section 500 of the transportation act, 1920, is expressly declared the policy of Congress to foster and preserve in full vigor both rail and water transportation. We think the amendment was the Congress' way of saying that we should follow a less liberal policy in dealing with departures from the long-and-short-haul rule than had been followed in former years. Our administrative power at this time is in some respects narrower than before the amendment. The fourth section, as amended, requires the observance by us of certain administrative rules which we were enforcing prior to the amendment, but which in some measure lay

within our sound discretion to modify or change. We are also required now to accord due observation to section 500 of the transportation act, 1920, which indicates the purpose of Congress—

> to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

Moreover, the requirements of section 15a may not be defeated or jeopardized by the action of particular rail carriers seeking to augment their own net earnings, irrespective of the effect of rate changes adverse to the carriers of the country generally, or of a large territorial group. *Trunk Line and Ex-Lake Iron Ore Rates*, 69 I.C.C. 589. *It clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle.*" (Emphasis supplied)

The Commission's discussion in this case is a landmark. The concern it expresses for the protection of water transportation from the competition of uneconomic rail charges fairly states the contemporaneous understanding of the congressional purpose in enacting these changes in Section 4. Clearly it is not consonant with this purpose to authorize fourth section rail-rate departures created solely by the promulgation of separately-published *non-compensatory* water-competitive rail charges when the only basis urged for authorizing the fourth section departure is the existence of water competition.

Thus both language and purpose of Section 4 required that the 5½¢ rate be compensatory before the Commis-

sion could lawfully authorize approval of combination rates violating Section 4 of which it was a part. The Commission erred in refusing so to rule.

Not only Section 4 required the 5½¢ rate to be compensatory, however, but Section 1(5) also required each rate to be just and reasonable. To be just and reasonable, a rate must, among other things, at least cover out-of-pocket costs of the service provided. *Chicago & Eastern Illinois R. Co.* v. *United States*, 107 F. Supp. 118, 123 (S.D. Ind., 1952) *aff'm'd*, 344 U.S. 917; *Barge-Rail Coal from Huntington, W. Va., to Chicago District*, 315 I.C.C. 129 (1961), *aff'm'd without reported opinion*, (N.D. Ill., 3/25/63); *aff'm'd on motion, Chicago & Eastern Illinois Railroad Co.* v. *United States*, (U.S. Supreme Ct., No. 275, decided 12/3/63, 32 L.W. 3201, 3202-3204). The Commission had heretofore held that any separately-published rate must comply with all requirements of the act, whether the rate were proportional or otherwise. *City of Sheboygan* v. *Chicago & North Western Ry. Co.*, 215 I.C.C. 65, 70 (1936); *Phoenix Utility Company* v. *Southern Ry. Co.*, 173 I.C.C. 500, 501-2 (1931); *Basing Rates on Paving Brick from Jacksonville to Florida Points*, 100 I.C.C. 390 (1925); *Cairo Board of Trade* v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 (1917). This Court has specifically so held with respect to a proportional rate in *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 279 U.S. 768, 776 (1929). The Commission erred when it failed to do even as much as make a finding on this point.

B. The 5½¢ Rate is Unlawful Because No Showing Was Made That It Would Increase The Net Revenues Of The Applicant Railroads.

In the *Transcontinental Cases of 1922* the Commission sensibly concluded that "It clearly would defeat the intent

of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle." 74 I.C.C. at p. 71. Conforming to the rule it had stated, the Commission disapproved reduced rates which would not increase traffic enough to offset (a) loss of revenue on traffic which would be retained in any event; and (b) the out-of-pocket cost of transporting the increase in traffic. The railroads are not to be permitted to play dog in the manager by publishing rates that do not benefit themselves for the sole purpose of injuring competing barge lines. *Transcontinental Westbound Automobile Rates,* 209 I.C.C. 549, 559-561 (1934).

The protestants had duly raised this point in their protests. The Commission should have made findings on this point since it was a condition precedent to granting the requested relief. *North Carolina* v. *United States,* 325 U.S. 507 (1945); *Alabama Great Southern Ry. Co.* v. *United States,* 340 U.S. 216 (1950); *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *Illinois,* 355 U.S. 300 (1958); *A. L. Mechling Barge Lines Inc.* v. *United States,* 368 U.S. 324 (1961). It did not do so.

The applicant railroads had the burden of proof that the 5½¢ rate would benefit them by increasing their net revenues. *Transcontinental Westbound Automobile Rates, supra; Counters, Desks, Tables, from Grand Rapids to Indiana and Ohio,* 302 I.C.C. 123 (1957); *Iron Ore from Norfolk To Toledo Dock,* 291 I.C.C. 93 (1953). Witness Tasčik testified that he had not looked into the effect of the 5½¢ rate on the revenues of other applicant railroads, saying, "My concern is with the New York Central. I don't know what traffic any other railroad might have lost; my one concern was to get traffic for the New York

Central." (R. 318). He appeared to concede that the barge traffic being diverted by the 5½¢ rate would have gone east by rail, and the applicants would have had the revenue from the reshipping rate in any event. The only other testimony on this point was that the only economical use of ex-barge corn billing in Chicago was to cancel it against corn shipments east by rail. The sole conclusion possible from this evidence is that the only added revenue realized by applicants for the new transportation from Belt station to Kankakee to have been the 5½¢ rate which did not cover the out-of-pocket costs of providing this service! Applicants could not possibly realize any increase in net revenues under such circumstances.

Witness Tascik contended that the NYC (not the applicants as a group) did realize a saving in avoiding a haul from Chicago to Kankakee over the NYC's circuitous route and in avoiding switching absorptions in Chicago. No cost study had been made, however, to determine whether the single car hauls from Belt stations were in fact more efficient than the multiple car hauls from Chicago shown in Exhibit 14. Another of the applicants had a more direct route to Kankakee, and most of the switching charges in Chicago were paid to the NYC's own subsidiaries. In addition, not all the corn shipped from the Belt was used at Kankakee (Ex. 48, p. 4, R. 802), and routing from Chicago to Kankakee would not have been necessary on much of the remainder.

Most pertinent, moreover, was the fact that this alleged saving would be reversed and become a needless expense if Witness Tascik were compelled to permit free use of the 5½¢ rate by Chicago merchants and shippers, and corn began flowing to Chicago from the Belt in the volume they would use. The very argument was thus premised entirely on Witness Tascik's ability to perpet-

uate the discrimination against Chicago. Still the Commission recited the argument and found no reason to consider in this proceeding the allegations of discrimination against Chicago.

In even mentioning the argument as a reason for disregarding evidence of the cost of the haul from Belt stations to Kankakee, the Commission took a position it contradicted the following year in *Barge-Rail Coal from Huntington, W. Va. to Chicago District*, 315 I.C.C. 129 (1961). In *Barge-Rail Coal* the Commission disapproved joint barge rail coal rates because it found that the rail portion of the rate would be only $2.04 per ton, whereas it found that the out-of-pocket cost of the rail haul would be $2.15 per ton. It ignored as a justification of the $2.04 the fact that the small railroad involved received a division of only $1.66 per ton from the all rail rate for exactly the same service. See Justice Black's dissent in *Chicago and Eastern Illinois Railroad Co.* v. *United States*, 32 L.W. 3203. Yet at Kankakee the large railroad is permitted to charge a rate below out-of-pocket costs on precisely the same kind of justification that was not sufficient for a small railroad cooperating with a barge line. How long can the Commission continue to use different standards for large railroads and small barge lines to the disadvantage of the barge lines!

II. THE COMMISSION ERRED IN FAILING TO CONSIDER VIOLATIONS OF SECTION 3, PARAGRAPHS 1 AND 4, OF THE INTERSTATE COMMERCE ACT AND OF THE NATIONAL TRANSPORTATION POLICY BY THE 5½¢ RATE.

The Commission refused to pass on, or to make adequate findings on, allegations of substantial violations of Section 3, Paragraphs (1) and (4), of the Act,[11] and of

[11] 63 Stat. 485, 49 U.S.C. § 3, Paragraphs (1) and (4).

the National Transportation Policy by the 5½¢ rate. These allegations had been raised in protests which were the basis for the hearing ordered by the Commission. Evidence was introduced with respect to each of them.

The evidence showed that by design the use of the 5½¢ rate had been restricted so as to make it difficult or impossible for Chicago processors to use, that the NYC, despite unfulfilled declarations of intent to remove the milling-in-transit requirement so as to permit Chicago's use of the rate, intended to prevent corn shipped on the rate from going through Chicago, and that the volume of free[12] corn shipped from the Belt towns to Chicago fell from 273 cars for a ten-month period to 46 cars in an equal period after the 5½¢ rate became effective. In its brief the Board of Trade discusses the discriminatory effect of the milling-in-transit requirement to illustrate the four forms of discrimination against Chicago which it had alleged in its protest and on which it had introduced evidence at the hearing.

The evidence further showed if the NYC carried products milled from such corn from Kankakee to Chicago for further shipment by another rail carrier to New York, the NYC got a division of 13¢ per cwt. and the carrier from Chicago to New York received only 36.5¢ per cwt., while that same carrier would charge 49.5¢ per cwt. to transport to New York products milled from corn brought to Chicago by a connecting barge carrier. Further evidence was refused admission, even though enough had been developed to show a strong likelihood that the arrangement violated Section 3(4) of the Act. *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); *Arrow*

[12] "Free" corn was corn not owned by, or pledged to, the Commodity Credit Corporation. Commodity Credit Corporation corn was not shipped at the 5½¢ rate.

Transportation Company v. *United States*, 176 F.Supp. 411 (N.D. Ala., 1959), *aff'd sub nom State Corporation Commission of Kansas* v. *Arrow Transportation Company*, 361 U.S. 353 (1920).

Most astounding was the Commission's casual finding that, although Mechling had fully distributed costs approximately 10¢ per cwt. less than those of the NYC, this advantage was entitled to no protection "where, as in this instance, the railroad's efforts to secure traffic do not amount to a destructive competitive practice." This low cost has heretofore been considered the inherent advantage of water transportation within the meaning of the National Transportation Policy's[13] mandate to the Commission to protect the inherent advantage of competing modes of transportation. *Interstate Commerce Commission* v. *Mechling*, *supra*, at pp. 577, 581. The modification of Section 15a(3) of the Act in the Transportation Act of 1958[14] did not emasculate this provision of the policy. This Court has recently said:

> "Moreover, it is clear that Congress did not consciously or inadvertently defeat this purpose when it included in § 15a (3) a reference to the National Transportation Policy. The principal reason for this reference, as the hearings show, was to emphasize the power of the Commission to prevent the railroads

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[13] 54 Stat. 899, 49 U.S.C. preceding § 1. The policy provides in part:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantage of each; . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

[14] 72 Stat. 572, 49 U.S.C. §15a (3).

> from destroying or impairing the inherent advantages of other modes. And the precise example given to the Senate Committee, which led to the language adopted, was a case in which the railroads, by establishing on a part of their operations a compensatory rate below their fully distributed cost, forced a smaller competing *lower cost* mode to go below its own fully distributed cost and thus perhaps to go out of business." *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744, 758 (1963).

In *New Haven* this Court left the determination of means of both measuring and protecting inherent advantages of competing modes of transportation to the Commission for initial resolution. The Commission has made no findings in this proceeding on the means of protecting the barge lines' inherent low cost advantage, apparently on the premise that if it found no destructive competition within the meaning of Section 4, it need not make any findings with respect to the National Transportation Policy. Certainly in the absence of some traffic situation or compelling reason of national defense not present in this case, however, it would appear to have been the congressional intent to preserve to the barge lines the full amount by which the railroads' fully distributed costs exceeded those of the barge lines. The Commission in any event erred in failing to make findings which would show some reason for not according to barge line and shippers this low cost advantage or in the alternative would protect the advantage.

The Commission explicitly stated with respect to the discrimination against Chicago that such matters would not be considered in a fourth section proceeding, but must be made the subject of a separate complaint proceeding. Tacitly the violations of the National Transportation Policy and Section 3(4) seem to have been dealt with in

similar fashion by the Commission. The court below explicitly so dealt with them.

Plaintiffs had raised these points in protests filed with the Commission in reliance on repeated statements of the Commission and this Court that fourth section departure rates should not and would not be authorized if the rates violate other sections of the Act. *Intermountain Rate Cases*, 234 U.S. 476, 486 (1914); *City of Spokane* v. *Northern Pacific Ry. Co.*, 21 I.C.C. 400, 426 (1911); *Transcontinental Cases of 1922, supra*, p. 71; *Bituminous Coal to Buffalo, N. Y.*, 219 I.C.C. 554, 560 (1936); *Pig Iron to Butler, Pa.*, 222 I.C.C. 1, 2 (1937); *Iron & Steel to Minnesota*, 231 I.C.C. 425, 428 (1939); *Lumber from the South and Southwest*, 245 I.C.C. 67, 73-74 (1941); *Coal Briquettes in the South*, 289 I.C.C. 341, 376-377 (1953). In the *Intermountain Rate Cases* this Court specifically pointed out that any application for the Commission's authority to depart from the fourth section must be considered "in view of the preference and discrimination clauses of the second and third sections" of the Act. When these protests were filed, authority was clear and consistent.

Furthermore, good practice by the Commission should encourage the determination insofar as possible of all questions relating to these rates in one proceeding rather than requiring proliferation of proceedings on the same rates before an already over-burdened agency. As was said by Commissioner Porter in *Jamestown Chamber of Commerce* v. *Pennsylvania R.R. Co.*, 139 I.C.C. 491, 492-493 (1928):

> "We believe it desirable and in harmony with the more modern rule adopted by the courts of permitting all parties interested in the same subject matter to become parties to the litigation and so far as possible settle the entire controversy in one proceeding,

to permit the intervention of parties situated as were the interveners in this case."

The Commission discourages relitigation in its Rule 101 (f), which refuses rehearings "submitted by the same party or parties, and upon substantially the same grounds as a former petition." Since the enactment of the Transportation Act of 1940 (54 Stat. 898), this Court holds that "the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole'." *American Trucking Association* v. *United States*, 355 U.S. 141, 152 (1957). Application of the Act as a whole will not permit the Commission wilfully to blind itself to infratcions of Sections 1, 2 and 3 of the Act by rates which cannot be charged by the railroad without the Commission's authority—especially when the Commission can grant such authority only after making an investigation of the rates.

The Commission's order would require needless multiplication of proceedings in the interest of a dryly technical formality. Courts have been trying to free themselves of such purposeless formality, and it has no place in proceedings before an agency charged with expeditious administration of an act as a whole.

The order was a departure from prior consistent Commission practice, hitherto correctly regarded by the Commission itself as enjoined upon it by the Act and by the expressions of this Court. The departure was made ex post facto without prior announcement. Such changes in administrative practice or interpretation which affect the rights of parties have been denied retroactive effect from earliest times. *United States* v. *McDaniel*, 32 U.S. (7 Pet.) 1, 13-14 (1833); *United States* v. *Alabama Great Southern R. Co.*, 142 U.S. 615, 621 (1892); *Luckenbach Steamship Company* v. *United States*, 280 U.S. 173, 182

(1930); *West* v. *United States ex rel. Alling*, 30 F. 2d 739, 741 (D.C. Cir. 1929); *Henry Clay and Bock & Co.* v. *United States*, 205 F. 2d 160, 165 (C.C.P.A., 1953).

The authority asserted below was a dictum of a district court (made sixteen months after these plaintiffs filed their protests) in *Seatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819 (S.D. N.Y., 1958). In that case the court nevertheless did strike down the Commission's fourth section order under consideration. The dictum from that opinion would no doubt have been more carefully considered (and would certainly have been submitted to review) if it had in any way affected the result. It rested, expressly, on what is a rather obvious misunderstanding of this Court's decision in *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178 (1916). In that case the plaintiffs had not participated in the Commission proceeding. They filed only a petition for reconsideration after the Commission entered its order. Justice Brandeis specifically stated that they were not bound by the order *since they had not participated in the proceeding before the Commission* and that they therefore had an adequate remedy by means of complaint to the Commission under Section 13 of the Act. In pertinent facts, the case could hardly resemble less the plight of these plaintiffs who have participated diligently throughout this proceeding before the Commission at great expense of time and money in reliance upon the Commission's previous pronouncements.

The Commission should not now be allowed to enmesh them in another equally long and costly proceeding for the sole purpose of establishing without prior announcement narrow procedural compartments which can serve only as traps for the unwary. The Commission's duty under Section 12 of the Act (62 Stat. 909, 49 U.S.C. §12)

is to enforce all sections of the Act. (*The Tap Line Cases*, 234 U.S. 1, 29 (1914)). It must do so, particularly where, as here, all parties were advised in advance of the points at issue and participated in a hearing at which evidence on these points was introduced with full opportunity for cross-examination and rebuttal.

III. THE 5½¢ RATE WAS LOWER THAN NECESSARY TO MEET COMPETITION.

Although competition from other modes of transportation has long been recognized as creating a special case sufficient to justify authorization of rates that violate the long-haul-short-haul principle, a corollary of this recognition has been that this competition could justify a reduction in the long-haul rate only to the extent necessary to enable the long-haul carrier to compete with the other mode of transportation. Reductions in the long-haul rates below this level will destroy the competition used to justify the lower long-haul rate, and the promotion of such destructive competition has never been regarded as a special case within the meaning of Section 4's proviso. *Skinner & Eddy Corporation* v. *United States*, 249 U.S. 557, 568 (1919); *Citrus Fruit from Florida to North Atlantic Ports*, 266 I.C.C. 627, 636-638 (1946); *Pacific Coast Fourth Section Applications*, 264 I.C.C. 36, 39 (1945).

The examiner who heard the witnesses testify found from the drastic drop in river elevator receipts of corn from south of the river and the persistently higher bids for corn at the Belt elevators than at the river elevators after the 5½¢ rate went into effect that the 5¼¢ rate was destructively competitive and lower than necessary to meet water competition.

He recognized that total barge shipments of corn to Chicago from the ten river ports of Lockport, Joliet,

Morris, Seneca, Ottawa, LaSalle, Spring Valley, Hennepin, Henry and Lacon had increased in 1957 over 1956, but found that this resulted from a number of factors, some transitory, which offset the loss caused by the 5½¢ rate in 1957. Among these factors were the fact that Lockport and Joliet were too far removed from the Belt to be influenced much by the Belt operation, that new elevators at Lockport and Seneca were operating in the 1957 period and were not operating in the 1956 period, that the area produced 86,000,000 bushels more corn in 1956 for movement in the 1957 period than it had in 1955 for movement in the 1956 period, that diversion of corn from water to Belt would increase as the 5½¢ rate became started better known through advertising just recently ~~stated~~ at the time of the hearing, and that the great preponderance of corn from Henry, Hennepin and Lacon had been shipped to Memphis and New Orleans in 1956, whereas the great preponderance had been shipped to Chicago in 1957.

The Commission, however, relied principally on two of its own conclusions to support its ultimate conclusion that the 5½¢ rate was no lower than necessary to meet competition, even though it, too, found that the corn drawn by the river elevators from south of the river had been reduced by over 1,500,000 bushels in the first eight months of 1957 (R. 14) and recognized the existence of most of the other factors recognized by the examiner as tending greatly to increase river elevator shipments to Chicago in the absence of the 5½¢ rate.

The first of the Commission's conclusions was that the markup of the country elevator on its sales to river elevator operators should be ignored in comparing river elevator and Belt bids for corn, and that the Belt bids should be reduced by the 2½¢ per bushel markup of the Belt operators in order to make the Belt bids comparable

to the river bids. Since the Belt bids had averaged about 2.02¢ per bushel higher than river elevator bids, their reduction by 2.5¢ put them about .5¢ per bushel below the river bids. It was agreed that the elevator bidding .5¢ higher would get the corn.

This conclusion had no support in the testimony. Witness Graves, testifying in support of applicants, testified that the river elevator operators would have to pay 1¢ per bushel as the markup for the country elevator. Every other witness testifying on the subject said that the markup would be about the same as the markup of the Belt elevators on rail shipments. Whether the markup were 1¢ per bushel or higher, the rail bid would be the higher bid which would attract the corn. The witness who testified to one of the comparisons relied on by the Commission in drawing its conclusion testified categorically that the Belt bid was in fact the one drawing corn. The commission's erroneous conclusion that the river bids were higher cannot support the Commission's ultimate conclusion in any way. The proper conclusion would have been that the rail bids were higher and that the rail rate was lower than necessary to meet barge competition. The fact was that bidders for Belt corn did not need to bid their full rate advantage to attract corn from other sources. General Foods, the principal user of the rate, acknowledged that when it had filled its requirements, it reduced its bid or withdrew from the market entirely (R. 550-551).

The second conclusion of the Commission was that "while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges" (R. 28). This conclusion rested principally on a slight increase of corn shipments by barge to Chicago from the ten river ports in the first eight months

of 1957 over the same period of 1956. This increase was by no means as great as the 44% increase in rail shipments of corn to Chicago in 1957, an increase achieved despite the competition of Kankakee for the eastern market which developed from the 5½¢ rate. The Commission's conclusion took no account of the reasons for the increase, even though the Commission had previously found them to exist. In part the Commission's conclusion may have rested also on a selection of the testimony of two country elevators out of eleven who testified. Even this testimony is distorted to imply that the elevator at Marseilles drew corn from an area extending to within six miles from the Belt. The operator testified that his regular trading area extended only five or six miles south of the river, but that he had on occasion gone as far south as 18 miles for a particular customer (R. 686-687), and that since 1956 he had lost some customers and picked up others (without specifying the location of either) (R. 687). Marseilles is about 25 miles north of the nearest Belt station (R. 686). Witness Noder who operated an elevator on the Belt at Granville (R. 489) testified that after the 5½¢ rate became effective the only corn in his area going to the river elevator was grown within a mile of the river elevator and 12 to 14 miles from his elevator (R. 494-495). The Commission ignored this testimony despite the fact that he testified on behalf of applicants.

This discussion of the evidence does not involve the weight which the Commission should have given to particular evidence. In comparing the attractiveness of river and Belt bids for corn, the Commission ignored altogether a markup which all witnesses agreed the country elevator received on its sales to river elevators. In doing so, it drew a conclusion bereft of all support in the evidence. In regarding the comparative movement in 1956 and 1957

of barge movements to Chicago from the ten river ports as indicative that the 5½¢ rate had little effect on the barge movement, the Commission abandoned all pretense of rational application of the laws of cause and effect. The fact that with an increased crop and more river elevators operating, the barge traffic to Chicago was maintained from the north bank of the river with help from areas not much affected by the Belt and at the expense of loss of the barge line's southbound hauls was no guarantee that when these conditions reverted to normal the barge lines could continue to compete.

Many witnesses testified that farmers were slow to learn of the higher prices at the Belt elevators and slow to break established patterns of marketing their corn. These experienced elevator operators were sure that the diversion to the Belt would increase in the future as the 5½¢ rate became more widely known and appeared to gain more permanence with the passage of time. They knew their business and were true prophets.

By drawing conclusions squarely contrary to all the testimony on one point, ignoring and distorting other testimony on other relevant points, and drawing conclusions contradicting its own and the examiner's findings, the Commission did not give that rational consideration to both supporting and opposing evidence in the setting of the whole record which the law requires. *Public Service Commission of Utah* v. *United States*, 356 U.S. 421 (1958); *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 498 (1951); *Gooding* v. *Willard*, 209 F. 2d 913 (2d. Cir., 1954). This lack of rational consideration is yet another reason for vacating and setting aside the Commission's order.

CONCLUSION.

The Commission's order should be set aside. The Commission has committed an error in law in refusing to recognize that both Sections 1 and 4 of the Act require the 5½¢ rate to be compensatory in and of itself. Further it has erred as a matter of law in refusing to make findings on a number of violations by the 5½¢ rate of the Interstate Commerce Act other than Section 4. This refusal rests on a rule announced without prior warning that only compliance with Section 4 itself need be examined in a Section 4 proceeding, although the other violations are put in issue before hearing. Finally it has drawn conclusions squarely contradictory of all the evidence in point or not logically following from the evidence to hold that the 5½¢ rate is neither destructively competitive nor lower than necessary to meet competition. The result of these errors has been disruption of a long-standing rail rate structure on corn in Northern Illinois, drastic loss of business to plaintiff barge line and elevator operators, and deliberate discrimination against the City of Chicago, its merchants and manufacturers.

The Commission's Fourth Section Order 19346 should be vacated and annulled. Plaintiffs respectfully pray that this Court do so.

Respectfully submitted,

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APPENDIX.

The National Transportation Policy, 49 U.S.C. Note preceding Section 1.

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions:—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy."

49 U.S.C. Sec. 1(5); 63 Stat. 485.

§ 1, par. (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection there-

with, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

49 U.S.C. Sec. 3(1); 54 Stat. 902.

§ 3, par. (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. Sec. 3(4); 54 Stat. 902.

§ 3, par. (4). All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used

in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

49 U.S.C. Sec. 4(1); 71 Stat. 292.

§ 4, par. (1). It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: Provided, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: Provided further,

That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive Points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: And provided further, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

49 U.S.C. Sec. 12(1); 62 Stat. 909.

§ 12(1). The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recom-

mendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

49 U.S.C. Sec. 13(1); 49 Stat. 543.

§ 13, par. (1). Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make

reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.